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In the
Supreme Court of the United States

October Term, 1970

No.

OTTER TAIL POWER COMPANY

Petitioner

vs.

FEDERAL POWER COMMISSION AND VILLAGE OF LITCHFIELD LAKE, MINNESOTA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Otter Tail Power Company (Otter Tail), prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on August 4, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. A, *infra*, pp. A-1 through A-10) is not yet reported.

Opinion No. 551 of the Federal Power Commission,

Docket No. E-7278 (App. B, *infra*, pp. B-1 through B-17) is reported in 40 FPC 1262 and in 79 PUR 3d 259.

Opinion No. 551-A of the Federal Power Commission (App. C, *infra*, pp. C-1 through C-4) is reported in 40 FPC 1499.

JURISDICTION

The Judgment of the Court of Appeals (App. A, *infra*, p. A-10) is dated and was entered on the 4th day of August, 1970.

A Petition for Rehearing was timely filed (App. D, *infra*, pp. D-1 through D-7). The Petition for Rehearing was denied on the 24th day of August, 1970 (App. D, p. D-8).

The jurisdiction of this Court is invoked under *28 USCA* 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The construction of the Federal Power Act, and particularly Section 202(b) (*16 USCA* 824a(b)), and in connection therewith, the definitions contained in the Federal Power Act in *16 USCA* 796, Subds. (3), (4), and (7), and also Sections 202(a) and 201(f) of the Federal Power Act (*16 USCA* 824a(a) and 824(f)), is involved in the questions presented herein. Each of these sections is reproduced in Appendix E, *infra*, pp. E-1 through E-3).

The questions presented are:

I.

Whether Congress intended to grant authority to the Federal Power Commission to order a public utility (Otter Tail) to furnish its own facilities to support a new municipal (Elbow Lake) electric system which has its own generation and which ousted Otter Tail from serving the mu-

nicipality at retail. This involves the construction of the word "person" in Section 202(b), and whether it includes a "municipality" applying for the relief which is sought in this proceeding. We submit that this is an important question of federal law which has not been, but should be, settled by this Court, as will be developed in the Argument below.

II.

When Congress provided in Section 202(b) that the Commission must find (before ordering an interconnection) "that no undue burden will be placed upon such public utility thereby", did Congress intend to limit the prerequisite of "no undue burden" to a physical burden upon the facilities and not to include a serious economic burden which threatens erosion of the utility's system and the impairment of its credit? The Commission recognized the evidence which indicated there could well be a serious economic effect upon Otter Tail's integrated system and its credit, but held, as a matter of law, that the term "undue burden" was limited to a physical burden upon facilities and did not refer to an economic burden upon the Company (App. B, *infra*, p. B-11). On appeal to the Circuit Court of Appeals, this question of law was fully briefed and presented but was not expressly decided in the opinion of the Circuit Court of Appeals. This was specifically called to the Court's attention in the Petition for Rehearing with the request that it be considered and decided (App. D, *infra*, pp. D-4 and D-5). The Order denying the Petition for Rehearing (App. D, *infra*, p. D-8) ignored this request.

III.

Does the Federal Power Act eradicate the rules of law regarding the dedication of properties for public service? Otter Tail's properties are dedicated to retail service and Otter Tail does not hold itself out generally to supply wholesale service. The Order of the Federal Power Commission, confirmed by the Circuit Court of Appeals, requires Otter Tail to furnish wholesale service. This legal question was also raised on appeal to the Circuit Court of Appeals, but the Court failed to expressly consider or decide it. The Petition for Rehearing specifically called attention to it, and requested that the legal issue be decided (App. D., *infra*, pp. D-2 through D-4). The Order denying the Petition for Rehearing also ignored this request (App. D, *infra*, p. D-8).

STATUTES INVOLVED

The basis for federal jurisdiction in the Court of first instance is Section 313(b) of the Federal Power Act (*16 USC* § 825l(b).

The provisions of the Federal Power Act which are involved in the questions presented for review are listed above under that heading supra, and are reproduced in App. E, *infra*, pp. E-1 through E-3).

STATEMENT OF THE CASE

An understanding of the factual background which presents the legal issues is required. At the risk of oversimplification of a complex factual situation, we will attempt to summarize it briefly for present purposes. Over the past 60 years, Otter Tail has built up an integrated electric system, which now brings the advantages of scale and modern technology in furnishing retail service to 464 small

towns, and also rural customers, in western Minnesota, eastern North Dakota, and northeastern South Dakota. Otter Tail has consistently and historically dedicated its properties to retail service and has specifically stated that it does not hold itself out generally to supply wholesale service. Almost all of the towns served by Otter Tail's system lie within the marketing area of the Bureau of Reclamation, which markets underpriced government power from the dams on the Missouri River, supplemented by recently constructed and planned thermal plants by Basin Electric Cooperative, Inc. Municipalities are preference customers of the Bureau. Rural electric cooperatives, financed by 2% loans from the Rural Electric Administration, and subsidized by tax advantages, are also active competitors in Otter Tail's service area. Otter Tail's system is peculiarly vulnerable to erosion for the additional reason that there are no metropolitan centers served by Otter Tail's system. The towns are all relatively small. Elbow Lake was served by Otter Tail's system until Elbow Lake decided to go into the electric business on its own and ousted Otter Tail from the retail electric service. The plan, as promoted and adopted by Elbow Lake, was a system securing its supply of energy from local generation by diesel engines. Initially, there were two diesel units installed, with the plan calling for the addition of a third engine after the third year of operation, and the addition of a fourth engine as the load grew in future years. The Elbow Lake plant went into operation in 1966, at which time Otter Tail's service was cut off. Even before the local plant started operating, Elbow Lake filed this petition with the Federal Power Commission asking the Commission to order Otter Tail to furnish service to the new municipal plant which ousted Otter Tail. Elbow Lake alleges that its newly constructed plant is inadequate to fur-

nish firm electric service, and wants Otter Tail to support it. What Elbow Lake really wants is underpriced government power from the Bureau of Reclamation, using Otter Tail's facilities either to wheel government power to it, or to support their inadequate plant with wholesale service until they can make arrangements with others to do that.

The evidence shows that other municipalities served at retail by Otter Tail's system are keeping in touch with the Elbow Lake case, with a view towards also leaving Otter Tail's system if a precedent is established which furnishes a path for other towns to follow. The evidence also shows that the threat of this erosion will impair the credit of Otter Tail in the money markets of the country where it must secure necessary capital funds. Otter Tail's management, believing it necessary to remain a viable company in the face of this threat, and to protect its remaining customers from the increased costs with which they would be saddled by a diminishing system, adopted the policy of not furnishing its own facilities to support a new municipal system which ousts Otter Tail from retail service in that town. This is consistent with Otter Tail's historic policy of furnishing service at retail.

In this factual situation, the Commission, and the Circuit Court of Appeals, held that Elbow Lake was qualified to apply for and secure relief under Section 202(b). While the Order of the Commission which was appealed from provides for only a short-term interconnection, this legal issue is precisely the same as will be involved in granting or not granting a long-term interconnection which is still under consideration at the Commission level. This basic legal issue, as well as the other points presented hereby, should be decided at the earliest point possible.

ARGUMENT

I.

ELDOW LAKE DOES NOT QUALIFY AS A "PERSON" UNDER SECTION 202(b) TO APPLY FOR AND SECURE THE RELIEF HERE REQUESTED.

In addition to the sections of the Federal Power Act which are involved, this point requires consideration of the legislative history of Part II of the Federal Power Act, and certain decisions which we will identify by short names for convenience in discussing them. These decisions include two decisions of this Court, one in the *Attleboro Case*[1] and the other in the *California Case*,[2] and also include the decision of the First Circuit in the *Shrewsbury Case*,[3] and the decision of the Fifth Circuit in the *Gainesville Case*.[4] Despite the difficulty in briefly presenting the point evolving from this material, we will attempt it.

To begin with, the definitions in the Federal Power Act clearly exclude a municipality from the "person" entitled to relief under Section 202(b). Subdivision 4 of Section 796 (*16 U.S.C.A.*) defines "person" as "an individual or a corporation"; Subdivision 3 defines "corporation" expressly excluding "municipalities"; and Subdivision 7 defines "municipality" as including any political subdivision of a state competent to carry on the electric business (App. E, *infra*,

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[1]*Public Utilities Commission v. Attleboro Steam & Electric Company*, 273 U.S. 83, 71 L.Ed. 549, 41 S.Ct. 294 (1927).

[2]*United States v. Public Utilities Commission of California*, 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1952).

[3]*New England Power Company v. Federal Power Commission*, 349 F.2d 258, 60 PUR 3d 77 (1st Ct. 1965).

[4]*Florida Power Corporation v. Federal Power Commission*, — F.2d —, 5th Ct., No. 27404, May 1, 1970.

pp. E-2 and E-3). These definitions are re-enforced by Section 201(f) (App. E, *infra*, p. E-3).

Pertinent excerpts from the legislative history are contained in App. F, *infra*, pp. F-1 through F-10).

We think it fair to state that this legislative history makes it clear that Congress did not intend to grant the Federal Power Commission authority to compel private utilities to furnish their facilities to support municipal plants, and intended to exclude municipalities from this part of the Act. Such action was intended to fall within the voluntary interconnection and coordination of facilities to be encouraged under Section 202(a) (App. E, *infra*, p. E-1). This legislative history is repeatedly referred to in the *California Case*, the *Shrewsbury Case*, and the *Gainesville Case*, and also in the Opinion of the Eighth Circuit involved in this Petition.

We will discuss the decisions in their chronological order. *Attleboro* preceded the enactment of Part II of the Federal Power Act. *Attleboro* held that the States did not have power to regulate the wholesale rates of electricity in interstate commerce. This resulted in a "regulatory gap", as the Federal Power Act did not then place such power in the Federal Power Commission. This Court, in the *California Case* held that Part II of the Federal Power Act was a direct result of *Attleboro*, and that Part II was passed to fill the regulatory gap which resulted from that case, and that the Act should not be construed to frustrate that main objective (345 U.S. at p. 311). The *California Case* did involve the regulation of wholesale rates in interstate commerce and the conflicting jurisdictions of the State of California and the Federal Power Commission over such regulation. In that context, the definitions were considered and held not to prevent the attainment of the objective of filling the regula-

tory gap as applied to the regulation of wholesale rates in interstate commerce. In doing so, we respectfully submit that the Court did not hold that the word "person" in Section 202(b) was not governed by these definitions. This distinction or rationale was practically conceded by the Solicitor General of the United States in his brief filed with this Court in the *California Case*. A quotation from that brief is contained in Appendix G, *infra*, p. G-1. The legislative history is referred to in Footnote 23 on page 313 of 345 U.S.

Nevertheless, the First Circuit in *Shrewsbury* (the next case in point of time) considered the *California Case* as determining the meaning of "person" under Section 202(b). On the facts, the issue in *Shrewsbury* was merely the elimination of a "middleman" in a corporate structure as there was no contest on whether *Shrewsbury* should be served or not by the utility. The discussion in the case, however, does transpose the *California Case* into another area—whether a municipality is entitled to compel the use of the facilities of a private utility under Section 202(b). In doing so, the First Circuit limited its discussion by saying that the question of whether a municipality which generates as well as distributes electricity is to be regarded as a "person" under Section 202(b), was not passed upon (349 F. 2d at pp. 262-3).

The next case in order is the *Gainesville Case*. *Gainesville* did have generation. The Fifth Circuit extended the *California Case*, as previously applied to Section 202(b) by *Shrewsbury*, to a municipal system having generation. The Fifth Circuit stated that "Despite the apparent cogency of the argument" presented by the definitional sections of the statute, the Court was compelled to follow the *Califor-*

nia Case, as extended by the *Shrewsbury Case*. For the convenience of the Court, the *Gainesville* decision is reproduced in Appendix H, *infra*, pp. H-1 through H-15; see, in particular, pp. H-10 and H-11. We are informed that Petitions for Writs of Certiorari have been filed in the *Gainesville Case*.

The latest decision is, of course, the decision of the Eighth Circuit in this case which, in substance, follows the *Gainesville* and *Shrewsbury Cases*.

The result of these cases is, that the decision of this Court in the *California Case* has been extended beyond what we submit the decision actually covers. The distinction between "filling the regulatory gap caused by Attleboro" and thus not frustrate the Congressional intent to grant the Commission the power to regulate wholesale rates, and the construction of Section 202(b) of the Act which gives the Federal Power Commission limited power to compel interconnections, can be supported and argued in much more detail, as it will be if this Petition is granted. Here, we think we should be content with the above in support of our statement that this point involves a question which has not been, but should be, settled by this Court, within the meaning of *Supreme Court Rule* 19(b).

II.

CONGRESS DID NOT LIMIT THE "NO UNDUE BURDEN" PREREQUISITE IN SECTION 202(b) TO A PHYSICAL BURDEN UPON THE FACILITIES.

This is a pure legal question involving a judicial construction of Section 202(b) of the Federal Power Act (App. E, *infra*, p. E-2). The Federal Power Commission construed the Act—

"A careful reading of the Act leads us to the conclu-

> sion that the term 'undue burden' as used therein refers to a physical burden upon the facilities and not to an economic burden upon the company." (App. B, *infra*, p. B-11).

There is no basis in the Act itself to warrant such a limiting construction of the words used by Congress. It is important here because the evidence shows that Otter Tail's integrated system will be eroded and its credit impaired by establishing a precedent here which furnishes a path for other communities to follow in leaving Otter Tail's system.

We submit that "undue burden" must certainly include serious damage to a utility's future ability to serve its customers and remain a viable entity. We add that "no undue burden- - - -upon such public utility" has a narrower focus than the "public interest" requirement which is also contained in the same sentence in Section 202(b). True, these factors should be and will be taken into account in determining whether or not it is in "the public interest" to order an interconnection, and, as pointed out by both the Commission and the Court, there may be cases where the benefits to the public might outweigh the adverse effects on the utility, the decision as to the "public interest" requiring a balancing of all interests involved. However, Congress, in addition to consideration of "the public interest", made it clear that a compulsory interconnection should require a finding that "no undue burden will be placed upon such public utility thereby."

As noted above, this point was expressly raised and presented to the Circuit Court of Appeals for decision, and the lack of the Court's expressly deciding it is pointed out in the Petition for Rehearing (App. D, *infra*, pp. D-4 through D-7).

We respectfully submit that Petitioner is entitled to have this legal issue decided at this point in the litigation.

III.

THE FEDERAL POWER ACT DOES NOT ERADICATE THE RULES OF LAW REGARDING THE DEDICATION OF PROPERTIES FOR PUBLIC SERVICE.

This is another legal point that was squarely presented, but not expressly considered and decided by the Circuit Court of Appeals, despite its being again called to the attention of the Court in the Petition for Rehearing (App. D, *infra*, pp. D-2 through D-4).

The Federal Power Commission recognized the facts shown by the evidence that Otter Tail does not hold itself out generally to supply wholesale service, but nevertheless, held—

> "That section (Sec. 202(b)) does not limit the authority of the Commission to order interconnections of facilities and interchange of power to systems which have dedicated their facilities in a particular manner or held themselves out as rendering a particular service." (App. B, *infra*, p. B-12).

The basic need of dedication of properties to public use is a general and well recognized rule of law.

26 *Am. Jur.* 2d, page 230, Footnote 5. Also see *Klatt v. Railroad Commission*, 192 Cal. 689, 221 Pac. 926 (1923)—this rule is stated in 221 Pac. at p. 931. *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 ALR 249 (1918)—particular attention is given to this rule in *8 ALR* at p. 259; *Southern Ohio Power Company v. Public Utilities Comm.*, 110 Ohio St. 246, 143 N.E. 700, 34 ALR 171, at p. 174 (1924).

In *Jersey Central Power and Light Company v. Fed-*

eral Power Commission, 319 U.S. 61, 63 S.Ct. 953, 87 L.Ed. 1258, 48 PUR (NS) 129 (1943), this Court gave recognition to the general principle that although a company may be a public utility as defined by the Federal Power Act, all of its transactions do not necessarily fall under the regulatory power of the Commission (319 U.S. at p. 73).

CONCLUSION

It is respectfully submitted that the Writ of Certiorari should be granted for the reasons above stated, which are summarized as follows:

Point I presents an important question of federal law involving the construction of the Federal Power Act, as it is affected by the decisions of this Court, and the decisions of the First, Fifth, and now the Eighth Circuit Courts of Appeals, which question, as thus presented, has not been, but should be, settled by this Court.

Points II and III are also important questions of federal law each of which has not been, but should be, settled by this Court. There is an added factor in Points II and III, in that each of these legal issues were fully and squarely presented to the Circuit Court of Appeals for decision, but neither of them were expressly decided in the opinion of that Court. A proper request for each of said points to be specifically decided by the Circuit Court of Appeals was made in the Petition for Rehearing before that Court, but the request was ignored in the Order Denying the Petition for Rehearing. We respectfully request this Court to give consideration to each of these issues by either (a) this Court considering and deciding each of them, or (b) if it is deemed preferable by this Court to have the Circuit Court

of Appeals first pass upon these points in a decision by that Court, that this Court direct the Circuit Court of Appeals to do so, under the exercise of this Court's power of supervision under Rule 19(b); or (c) that this Court handle the questions thus presented in such manner as the Court deems fitting and proper. In any event, we submit that petitioner is entitled to a judicial consideration and decision of these points, as they have been properly raised and presented.

Respectfully submitted,

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Dated: November, 1970.

CERTIFICATE OF SERVICE

I, Cyrus A. Field, attorney for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of November, 1970, I served copies of this Petition for a Writ of Certiorari on the respondents named therein by depositing the same in the United States Post Office, with postage prepaid, addressed to each of the following parties:

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Assistant General Counsel
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Washington, D.C. 20426.

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

(Heading Omitted)

[August 4, 1970.]

Before Vogel, Blackmun* and Bright, Circuit Judges.

Vogel, Circuit Judge.

Following a hearing before the Federal Power Commission, Otter Tail Power Company petitions this court under § 313(b) of the Federal Power Act (16 U.S.C.A. §§ 824, et seq.) to review and set aside an order requiring interconnection between petitioner and Elbow Lake, a municipal power company, issued pursuant to § 202(b) of the Act. Otter Tail maintains, *inter alia*, that this case is not governed by § 202(b) that the order is a deprivation of property without due process of law, and is not supported by the evidence. We disagree and affirm.

Otter Tail Power Company is an investor-owned utility serving primarily small towns located in western Minnesota and eastern North and South Dakota. Its business is almost exclusively retail as opposed to the wholesale transfer of power. Through the years Otter Tail has established a large integrated system running the full gamut from initial production to final sale of electrical power combined with pool arrangements supplying emergency reserves.

In contrast, Elbow Lake is a small municipally-owned

*Blackmun, Circuit Judge, took no part in the disposition of this case

power producer serving only the limits of its political entity. Until 1966, Otter Tail served Elbow Lake at which time the latter went into both production and sale of electrical power. Otter Tail opposed Elbow Lake's decision in both the state and federal courts.[1]

Elbow Lake supplies its consumers from two generators each capable of producing 1,250 KW, including a ten per cent overload capacity. One generator is used while the other is idle. The peak load for the first year of operation was 1,120 KW, and the second year 1,240. Thus Elbow Lake was dangerously close to reaching its firm power supply since any figure over the actual overload capacity would require the simultaneous use of both generators causing a possible loss of service should one malfunction during a peak period.

On these facts, the Federal Power Commission ordered installation of a temporary connection between Otter Tail and Elbow Lake for use only in case of such emergency. The connection, which was to last for one year after final adjudication of this case, was to be made at Elbow Lake's expense and the power paid for at wholesale rates. From this order Otter Tail takes exception.

Otter Tail first maintains the Federal Power Commission is without jurisdiction to order the connection under the Act. Their argument follows two separate but equally unacceptable paths. Petitioner first contends any proceed-

[1] See Otter Tail Power Co. v. MacKichan, 265 Minn. 262, 121 N.W.2d 511; Otter Tail Power Co. v. Village of Elbow Lake, 251 Minn. 419, 89 N.W.2d 197. Also attempts by an REA co-op to bring in an additional line for emergency power supply were delayed by Otter Tail Power Company and Northern States Power Company. See Rural Electrification Administration v. Northern States Power Co., 351 F.2d 636, 643, cert. denied sub nom., Northern States Power Co. v. Rural Electrification Administration, 383 U.S. 945.

[illegible] in the instant case must be dealt with in accordance with § 202(c) of the Act rather than § 202(b), and no evidentiary purpose that necessitates application under § 202(b) of the Act. We accordingly [illegible]

Otter Tail argues § 202(b) only applies to government connections and temporary connections may only be ordered under § 202(c). Otter Tail further contends that since Otter Tail has been an emergency [illegible] the request by the Federal Power Commission for a temporary connection falls outside the scope of authority granted the Commission by [illegible] § 202(c). The contentions fail for [illegible] as the [illegible] § 202(c) establishes that Commission may be used to [illegible] exceptional circumstances must under [illegible] connections of the facilities to maintain adequate electric service [illegible]. As such the sections establish the

"§ [illegible] in pertinent part as follows:

"(b) Whenever the Commission upon application of [illegible] any person engaged in the transmission or sale of electric energy [illegible] after notice and after opportunity for hearing finds such action necessary or appropriate in the public interest it may by order direct a public utility [illegible] to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy to sell energy to or exchange energy with such persons [illegible]

"(c) During the continuance of any war [illegible] or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy [illegible] the Commission shall have authority either upon its own motion or upon complaint with or without notice, hearing or report to require by order such temporary connections of facilities and such generation, delivery, interchange or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest [illegible]" (Emphasis supplied.)

Otter Tail initially petitioned under § 202(c) but later amended its petition in compliance with § 202(b)

Commission to proceed without notice or hearing. On the other hand, § 202(b) applies to a crisis which is likely to develop in the foreseeable future but which does not necessitate immediate action on the part of the Commission. In the case at hand, Elbow Lake's first year's peak load was 1120 KW's which increased to 1245 KW's in its second year, just 5 KW's short of their generators' maximum overload capacity. In short, the present case is just the type of situation to fit into a § 202(b) hearing rather than § 202 (c). Otter Tail's argument that § 202(b) applies only to permanent and not temporary connections is not well taken. Suffice it to say that § 202(b) merely enumerates connections ordered by the Commission but does not specify either type or duration.

Otter Tail next challenges the Commission's right to order any interconnection between a municipality and a private company under § 202(b) of the Act. The argument bottoms itself on the definitional section of the Act contained in Part I of the statute (16 U.S.C.A. § 796(3) (4)) combined with the precise wording of § 202(b) and (f) of the Act (16 U.S.C.A. § 824a(b), 824(f)). Otter Tail maintains that § 3(3) of the Act defines corporation to specifically exclude municipalities, while § 3(4) limits the definition of person to individuals or corporations. Otter Tail then points to the fact that § 202(b) only mentions connections between "persons", which implicitly excludes municipalities. Lastly, § 201(f) is alleged to plainly remove all political entities from coverage of Part II of the Act.[3]

[3] § 201(f) reads in part:

> "No provision in sections 824-824h of this title shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, * * * unless such provision makes specific reference thereto."

Petitioner finally directs our attention to legislative history to support its analysis. During the hearings on the Act both the Commissioner of the FPC and its solicitor testified that Part II of the Act would not require private companies to be forced to allow governmental agencies to use their facilities. Thus petitioner maintains any ambiguities in the language of the statute are clarified by the history.

The Fifth Circuit recently considered and rejected an identical argument. See, Flordia Power Corporation v. Federal Power Commission, (May 1, 1970) . . . F.2d . . ., No. 27404. That court concluded that § 201(f) only limits the Federal Power Comission's right to order wheeling by a private utility for a public entity.[4] That court, after examination of the entire legislative history, stated:

> "* * * we can find no support for the conclusion that municipalities which generate their own power were to be treated differently from non-generating municipalities concerning anything other than 'wheeling'."

The Fifth Circuit also relied upon New England Power Co. v. Federal Power Commission, 1 Cir., 1965, 349 F.2d 258, which case Otter Tail invites us to distinguish or disagree with. Therein, Judge Maris, with Chief Judge Aldrich and then Circuit Judge Burger concurring, stated for the court at page 262 of 349 F.2d:

> "The contention that the Town of Shrewsbury is not a 'person engaged in the * * * sale of electricity' within the meaning of that phrase as used in section 202 (b) is based upon the definition of 'person' in section

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[4]Wheeling is a process where one power company carries power for a second company's customers.

> 3 of Part I of the Act, 16 U.S.C.A. § 796, which when read with the definition of 'corporation' in that section appears to exclude municipalities. The petitioners also rely on section 201(f) which states that 'No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, * * * unless such provision makes specific reference thereto.' 16 U.S.C.A. § 824(f). These contentions have however, heretofore been categorically rejected by the Supreme Court. Construing section 201(d) which provides that 'The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale', 16 U.S.C.A. § 824(d), that Court has held that the provisions of Part II of the Act (which part includes section 202) are applicable to municipal subdivisions of the State which purchase electric energy for resale. United States v. Public Utilities Commission of California, 1953, 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020."

The Fifth Circuit's analysis in Florida Power Corporation, supra, is identical with the position adopted by the Federal Power Commission itself. See, City of Paris, Ky. v. Kentucky Utilities Co., 1969, 41 F.P.C. 45. Moreover, as indicated by Judge Maris, the Supreme Court examined the same legislative history and stated:

> "We conclude, therefore, that the Congress attached no significance of substance to the addition of the word 'person,' and in fact did not intend it as a limitation on the Commission jurisdiction. * * *" See,

United States v. Utilities Commission, supra, 345 U. S. 295, at 313.

We agree with Florida Power Corporation and the Commission's analysis of the statutory scheme and are further bound by the Supreme Court's definition of the word "person". Accordingly, we reject Otter Tail's contention. Having disposed of Otter Tail's statutory contentions, we turn to its argument founded on due process and sufficiency of evidence.

Otter Tail contends any order which requires interconnection with a former customer turned competitor takes its property without due process. Otter Tail introduced evidence tending to show that other municipal purchasers were thinking of building their own power plants and forcing Otter Tail to supply Elbow Lake would merely encourage them to do likewise. Thus, as Otter Tail contends, Elbow Lake is the first domino in a series to fall once the Federal Power Commission converts § 202(b) into an economic suicide pact.

We believe Otter Tail misconceives the variety of interests involved and the actual scope of the order in question. Were this a conflict solely between Otter Tail and Elbow Lake, the argument might be well founded; but the controversy is not so limited. The consumers of Elbow Lake must also be considered, some, we dare say, who perhaps opposed their village's move into the power business. In short, the public also has a stake in this controversy. Cf., Cincinnati Gas & Electric Co. v. Federal Power Commission, 6 Cir., 1968, 389 F.2d 272, cert. denied, 393 U.S. 826. Moreover, the order is temporary in effect and only requires service of electricity in periods of actual need.

When assessing administrative regulation of public utilities, due process requires a delicate balancing of all interests involved. If the public interest outweighs the investor interest and expense to the corporation, the order will generally be upheld. See Michigan Central R. R. v. Michigan Railroad Commission, [1915] 236 U.S. 615, 620, 621. Usually a governing agency may compel interconnection and exchange of commodities between two or more public utilities as long as the order is reasonable and in the public interest. See Oregon-Washington R. & Navigation Co. v. Woodchild, [1911] 224 U.S. 510; Wisconsin Minnesota R. Co. v. Jacobson, [1922] 179 U.S. 287. At times even heavy cost of product expansion may be imposed when a vital public need is established. See Atchison, Topeka & Santa Fe R. R. Co. v. Railway Commission of California, [1911] 283 U.S. 380. However, while every interconnection is not blindly approved by the courts, the mere fact that a case is made with a competitive issue not in itself render the order illegal.

In this case we note the interconnection is only temporary until Elbow Lake finds another source which may range from purchase of another generator to having a separate line run from another company or cooperative. The interconnection must be performed at Elbow Lake's expense and Otter Tail will be compensated if and when electricity is

For course Otter Tail receives many benefits from the Federal Power Act. For example [illegible] of these interdependent companies to establish regional power pools to serve each other against sudden loss of power supply which is the very thing Elbow Lake is requesting in this case. Otter Tail and private companies also have the right of eminent domain to further their enterprises under the Act. See Federal Power Act [illegible]. Needless to say privileges imply responsibilities.

sued At this point we hold the order is in violation of the Fifth Amendment

Third I will lastly argue that the evidence is insufficient to support the order When examining an order of the Commission our function is merely to determine if there is substantial evidence to support the decision § 11(b) of the Act 16 U S C A § 824j(b) [illegible] Gas & Electric Co v Federal Power Commission supra 189 F 2d at 227 Woodbury Gas Producing Co v Federal Power Commission 1 Cir 1963 321 F 2d 162 cert denied 1966 384 U S 960 In this case the Commission found that such generator's capacity including its overload was 1,250 KW's The Commission further found the first year's peak load was 1120 KW's and that increased in the second year to 1245 KW's We conclude this evidence sufficient to forecast a possible power reserve shortage in the near future As such the findings are supported by substantial evidence

Order affirmed

A true copy

Attest

Clerk U S Court of Appeals Eighth Circuit

CONTINUATION OF APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 19628. September Term, 1969.

Otter Tail Power Company,

Petitioner,

vs.

Federal Power Commission, and Village of Elbow Lake, Minnesota,

Respondents.

Petition for Review of an Order of the Federal Commission

This Cause came on to be heard on the petition to review and set aside an order of the Federal Power Commission dated November 6, 1968; the joint appendix and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the said order of the Federal Power Commission in this Cause, be, and the same is hereby, affirmed.

August 4, 1970

APPENDIX B

[R. 1743] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION.

* * * * * * *

(Title Omitted.)

Opinion No. 551.

OPINION AND ORDER DIRECTING PHYSICAL INTERCONNECTION OF FACILITIES.

(Issued November 6, 1968)

Carver, Commissioner:

This proceeding was formally commenced on March 16, 1966, with an application by the Village of Elbow Lake, Minnesota (Elbow Lake). An amended application was filed May 29, 1967 which stated that Elbow Lake has an operating municipal electric utility, that it has requested Otter Tail Power Company (Otter Tail) to provide wholesale electric service to Elbow Lake, and requested Otter Tail to provide wheeling service over its transmission lines to Elbow Lake. Elbow Lake alleged that it has two sources of power—the Bureau of Reclamation and Basin Electric Power Cooperative of Bismarck, North Dakota—but no means of bringing the power to Elbow Lake without Otter Tail's assistance, and that Otter Tail has refused to provide either wheeling or wholesale service. The amended application asks that Otter Tail be ordered to provide wheeling service, "and for such other and further relief as may be just in the premises."

Otter Tail filed its answer to the original application on April 20, 1966, and its amended answer May 20, 1966.

Otter Tail's answer to the amended application was filed August 3, 1967, requesting dismissal of the application. That answer stated, inter alia, that Elbow Lake's amended application was not served on Otter Tail or its [R. 1744] attorneys as required by Rule 1.17 (b) of the Commission's Rules of Practice and Procedure, and that Otter Tail appeared specially and objected to the jurisdiction of the Commission on the following grounds: the application did not state the applicable statutory provisions as required by Rule 1.6 (b) (2); Elbow Lake, a municipal corporation, is not a "person" within the meaning of the Federal Power Act; at the time of filing the original application Elbow Lake was not engaged in the transmission or sale of electric energy as required by the Act, although it has since become so engaged. Otter Tail further alleged that should the Commission grant the requested relief, it would amount to a subsidy for the support of Elbow Lake's system, thereby depriving Otter Tail of the use of its property to serve its own customers, without due process of law; that this subsidy, which would aid a competitor, would in part destroy the facilities of Otter Tail, thereby constituting a taking of property without due process of law and without just compensation in violation of the Fifth Amendment.

Otter Tail also contended that to grant the requested relief would compel enlargement of its facilities (in proportion to the amount of power required to be sold Elbow Lake), impair its ability to render service to its existing customers, amount to an undue burden and not be in the public interest. Otter Tail stated that it has not held itself out generally to furnish wholesale service or wheeling service; that the Bureau of Reclamation contract with Otter Tail, paragraphs 26.(f) and 27.(c) (2), prohibits Otter Tail rendering wheeling service to Elbow Lake.

On February 5, 1968, Elbow Lake filed two letters. One requested that no action be taken "for the present" in the pending proceeding, and further requested a Commission staff analysis of power supply arrangements for Elbow Lake.[1] In the second letter, Elbow Lake asked for prompt interconnection with Otter Tail's Elbow Lake substation under Section 202 (c) of the Act, stating that Elbow Lake has two 1136 kilowatt generators, peak loads are fast outstripping the capacity of the individual generators, and "at such time as our peak load exceeds the capacity of either generator our power will become nonfirm." Elbow Lake also declared it was willing to pay for the interconnection facilities.

[R. 1745] On February 19, 1968, Otter Tail answered both letters, disputing that Elbow Lake had shown any facts which would warrant an immediate connection with Otter Tail's facilities. Otter Tail further denied that an emergency exists and requested that a hearing be fixed on the matter.

Section 202 (b) of the Act provides:

> Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed

[1] The letter states that Elbow Lake seeks "* * * a coordination study of future power supply for the Village of Elbow Lake with other power systems in the area."

> upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers * * *.

Section 202 (c) provides that during war and certain emergencies the Commission may order temporary interconnections without notice or hearing, on its own motion or on complaint.

On June 14, 1968, the Commission ordered a hearing in this proceeding. The Examiner was directed to hear the issues on the appropriateness of an interim emergency interconnection under Section 202 (c) in advance of the matters raised under Section 202 (b) of the Act and to certificate to the Commission, without initial decision, that portion of the hearing record bearing on the issues presented under Section 202 (c).

[R. 1746] A hearing was held by Presiding Examiner Ames W. Williams in Fergus Falls, Minnesota, from July 9 through July 12, 1968. The Examiner ruled that the hearing would include the issues in both Sections 202 (b) and 202 (c) to the extent that counsel was prepared to do so, but, faced with the statement of staff counsel that the necessary studies which had been requested with respect to the Section 202 (b) application have not been made, the

Examiner indicated that "If you are not prepared to go ahead, why, we cannot do it, but I think we should take this opportunity to elicit all the testimony that we possibly can at this time" (Tr. 219-220).

Otter Tail in its brief to the Commission has taken the position that no interconnection should be ordered. Staff urges that temporary interconnection of Otter Tail's facilities with the municipal distribution system should be ordered, and that such an order would be proper either pursuant to Section 202 (c) of the Act to meet an existing emergency or as an interim connection under Section 202 (b) while studies are made and pending an ultimate determination after further hearings on the issues under Section 202 (b). Both Otter Tail and staff have requested oral argument. Elbow Lake has not filed an independent brief but relies upon staff's presentation. Elbow Lake was represented by counsel at the hearing and participated by the introduction of evidence and cross-examination of Otter Tail's witnesses.

The Jurisdictional Questions.

Under Section 202 (b) of the Act, the Commission has jurisdiction to order an interconnection at the request of a State commission or a person, but only if the latter is engaged in the transmission or sale of electric energy. Otter Tail made the point in its answer to the amended application, but not in its brief, that Elbow Lake was not yet engaged in the transmission or sale of electric energy at the time of the filing of its original application. It is admitted, however, that Elbow Lake was engaged in transmission or sale at the time the amended application was

filed. This meets the statutory requirements of Section 202 (b).[2]

[R. 1747] While service to the amended application was not made in the manner provided by our rule, Otter Tail did in fact receive the amended application and answered it, and participated in a hearing which the Examiner ruled dealt with issues not only under Section 202 (c) but also under Section 202 (b). Otter Tail presented evidence bearing on the issues under Section 202 (b) without objecting to the Examiner's ruling, and contended before the Examiner and in its brief to the Commission that Section 202 (b) issues should be heard and resolved. Under these circumstances objections to the form of service are no longer effective. Service of the amended application, moreover, is not required by the statute but by a provision of the Rules and Regulations of the Commission. The notice to Otter Tail required by the statute was fully complied with by the action of the Secretary when he mailed the amended application. Where substantive rights are not affected, the Commission may waive the requirements of its own Rules and Regulations. Even assuming that those Rules were not adhered to, if no substantive rights are affected, as herein, the order setting the matter for hearing would constitute a waiver. Under circumstances such as these, to require a refiling and a new hearing would cause delay and expense, but would not affect the substantive issues to be decided.

Otter Tail's objection to the jurisdiction of the Commission on the ground that the amended application did not

[2] In case of an emergency the Commission may act under Section 202(c) without any application being filed.

comply with the requirement of Rule 1.6 (b) (2),[3] that the applicable statutory provisions be cited, is without merit. Failure to comply with this section of the Rules and Regulations may, in appropriate cases, be sufficient grounds for the rejection of the complaint, but cannot constitute an ouster of the jurisdiction of this Commission. There is no statutory requirement as to form of the application, and acceptance of the complaint would constitute a waiver of any defects due to the failure to comply with 1.6 (b) (2) of the Rules.

The other procedural jurisdictional issue raised by Otter Tail in its amended answer but not urged in its brief can be handled summarily. It is generally recognized that the extent of the relief which the Commission can afford is limited by the provisions of [R. 1748] section 202 (b). The Commission could not under that section[4] order sales of power to Elbow Lake without compensation. Nor could it order the interconnection if such order would compel enlargement of Otter Tail's generating facilities, or impair Otter Tail's ability to render adequate service to its customers. These limitations upon the power of the Commission do not affect its jurisdiction in the present proceeding to hear the issues and render appropriate relief, within its authority, based upon the facts presented.

The only argument made by Otter Tail in its brief with respect to the Commission's jurisdiction is that Elbow

[3]Section 1.6 of the Rules of Practice and Procedure was amended by Commission Order No. 359, issued February 5, 1968, after the pleadings in question were filed.

[4]The Commission would have jurisdiction under Section 202(c) to order an emergency interconnection even under circumstances where it would have no power to order interconnection under Section 202(b).

Lake is not a "person" entitled to the type of relief it has requested within the meaning of Section 202 (b) of the Federal Power Act. It makes this argument with full realization of the Commission and judicial precedents holding that a municipality is a "person" entitled to relief under Section 202 (b) of the Act. Crisp County Power Commission v. Georgia Power Company, Opinion No. 508, . . . FPC . . . (1966); United States v. Public Utilities Commission of California, 345 U. S. 295, 312-3, 316 (1953); Shrewsbury Municipal Light Department v. New England Power Company, 32 FPC 373 (1963), aff'd sub nom; New England Power Co. v. Federal Power Commission, 349 F. 2d 253 (1st Cir. 1965). We adhere to these precedents.

Elbow Lake's Need for Interconnection

With Otter Tail.

Otter Tail serves retail customers in over 460 communities in Minnesota and the Dakotas. Fewer than 30 of these communities have a population of over 1500. Consumers in Elbow Lake, which has a population of about 1500, formerly were served at retail by Otter Tail under a franchise granted by Elbow Lake. The franchise expired in 1960 and was not renewed.

[R. 1749] In 1966 Elbow Lake commenced to serve consumers within its boundaries through a municipally-owned distribution system powered by two diesel generators. One generator provides the power, while the other is on a standby basis in case the first unit breaks down. Each of the two generators has a name plate rating of 1136 kw—with a factory guarantee of 10 percent overload—or 1250 kw for two hours. Based on past load peaks and anticipated

growth it is expected by staff and Elbow Lake that the short demands of Elbow Lake will exceed the capacity of one generator in another year. Accordingly, they contend that Elbow Lake must buy another (smaller) generator or obtain an interconnection with Otter Tail in order to have adequate reserve power, since the remaining generator would not be able to handle the peak alone if one generator should fail. Otter Tail argues that the past peaks were abnormal and of very short duration so that the possibility of a generator breaking down at the time of such a peak is extremely small. Otter Tail also argues that the assured capacity of each of the generators exceeds the name plate rating and that one of them could, therefore, handle any peaks. The assured capacity is a matter of dispute. Otter Tail's contentions depend mainly on statements of a salesman of the generators which seem insufficient to rely upon. From the evidence presented, we conclude that there is a shortage of installed reserves in the municipal distribution system to meet an adequate standard of reliability for firm power supply.

The Scope of This Decision.

In its brief Otter Tail contends that the Examiner heard all issues of the case and that the Commission should deal finally with these issues. Otter Tail would have the Commission find that no emergency exists within the meaning of 202 (c), that an undue burden will be placed upon Otter Tail by the granting of any relief under 202 (b) or 202 (c), that it is not in the public interest to grant relief which would create a probability of a cascading effect of numerous other municipalities following the precedent of Elbow Lake, and that Otter Tail has not dedicated its prop-

erties to wholesale sale or held itself out as a wholesaler. Additionally, Otter Tail would have [R. 1750] the Commission find that it is improper to order it to wheel Bureau of Reclamation power to Elbow Lake because the Act does not allow the Commission to order Otter Tail to wheel government power, the Act does not allow the Commission to compel Otter Tail to transmit power for the benefit of a third party, and because Otter Tail's contract with the Bureau of Reclamation excludes any obligation to wheel power to municipalities served at retail by Otter Tail.

We think it clear that we cannot proceed at this time to a final determination of all the issues as requested by Otter Tail. It appears that the Examiner did proceed to hold a hearing to the extent counsel were ready to do so upon all the issues in the case. Otter Tail introduced evidence directed to showing that no interconnection with, or sale of energy to, Elbow Lake, or rendering of wholesale service to Elbow Lake should be ordered. Otter Tail contends that the record was complete. Staff counsel, however, as has been said, indicated that considerable additional time would be needed for studies to be made to determine whether lasting interconnection with Otter Tail was in the public interest or whether other possible interconnections later to be available would be preferable alternatives. We agree. Therefore, it will be necessary to remand this proceeding for further hearings on the unresolved issues to be held at such time and place as the Presiding Examiner or his successor in this proceeding may fix.

Section 202 (b) of the Act allows this Commission to order an interconnection for the transmission or sale of energy when it is necessary or appropriate in the public interest, but only where the Commission finds that no undue

burden will be placed upon the utility subject to the order. As we have previously indicated, we are unable at this time to determine the public interest with regard to a long term interconnection since the record is incomplete on this point. However, we believe that Otter Tail should be required to interconnect for a limited time with Elbow Lake, until the studies and later hearings mentioned above have been completed, and supply to that municipality electric energy at such times as it has excess capacity on its own system.

[R. 1751] Otter Tail's principal contention in its brief is that to require interconnection or wholesale sale of energy by it would place an undue burden upon Otter Tail. Otter Tail is an integrated system. Practically all of its sales are on a retail basis. The tiny amount of wholesale business still remaining is being eliminated. It does not wish to make sales at wholesale. If individual municipalities can set up their own plants and require Otter Tail to interconnect with them, and possibly to serve them at wholesale, Otter Tail expects and fears that other municipalities now served by it at retail will break away as Elbow Lake has done. Otter Tail's witnesses stated several small communities are watching the Elbow Lake experiment and will probably follow Elbow Lake's example if it is successful. Otter Tail urges that it places an undue burden upon it to require it to assist a competitor and create an example which may cause erosion of Otter Tail's business.

We find there is no undue burden upon Otter Tail. A careful reading of the Act leads us to the conclusion that the term "undue burden" as used therein refers to a physical burden upon the facilities and not to an economic burden upon the company. An economic burden may be subject to relief by the imposition of charges sufficient to off-

set that burden. No substantial physical burden upon Otter Tail's electrical facilities has been shown or even claimed. This is not to say that the argument advanced by Otter Tail as to possible destruction of its retail business is without weight. These facts are quite relevant to whether it may be in the public interest to order a long-term interconnection between Otter Tail and Elbow Lake. The welfare of Otter Tail is a part of the public interest. No action should be taken which may adversely affect Otter Tail unless there are benefits to the public as a whole which would outweigh the effect on Otter Tail. But all these facts will be taken into account when a decision is ultimately made with respect to a long-term interconnection and source of power for Elbow Lake. We make no such determination here.

What payment is to be made by Elbow Lake to Otter Tail for the service here ordered will be left to [R. 1752] negotiation between the parties, or, if they are unable to agree, for later determination by the Commission. The record is inadequate for a determination of this question at this time.

Otter Tail's brief also argues that Otter Tail has consistently and historically dedicated its properties to the furnishing of retail service and does not hold itself out generally to supply wholesale service. We believe this argument is not responsive to the request of Elbow Lake for relief under Section 202 (b) of the Act. That section does not limit the authority of the Commission to order interconnections of facilities and interchange of power to systems which have dedicated their facilities in a particular manner or held themselves out as rendering a particular service.

We need not decide the questions raised by Otter Tail with respect to wheeling power, since no such wheeling is here ordered. The studies still to be made may lead to the conclusion that Elbow Lake's long-term supply of power should be transmitted by someone other than Otter Tail. This would render moot the wheeling questions.

The connection here is ordered after notice and hearing pursuant to Section 202 (b). It is, therefore, unnecessary for us to determine whether there exists an emergency within the meaning of Section 202 (c).

This proceeding, we are told, will be closely followed as a possible precedent for future action by other municipalities. If other municipalities should desire to establish their own distribution systems, it is to be hoped that some of the present "Elbow Lake situation" may be avoided. Elbow Lake made known its intended separation from Otter Tail years ago, by its refusal to renew Otter Tail's franchise in 1960 and its approval of municipal bonds in 1962 to finance its own system. Not until 1968 did it request that a study be made to determine the best transmission and supply arrangements. After this proceeding was begun, Elbow Lake began generating and [R. 1753] distributing its own power, and thereafter Otter Tail took out its retail distribution lines which Elbow Lake was compelled to duplicate. The parties thus drastically changed the situation during the pendency of this proceeding. It would have been far better for Elbow Lake to have requested a study and to have had that study completed before severing itself from Otter Tail. Means should also be found to avoid the establishment of inefficient small generating plants if interconnection with more efficient sources of energy is available in the not-too-distant future. If it should

appear from the study in this proceeding that interconnection with another source of power will be available in two years, as has been suggested, it might have been preferable for Elbow Lake to have deferred its own municipal system for that length of time. Means should certainly be found to avoid the economic waste of ripping out an existing distribution system and building a duplicate. The positions of the parties should not be changed during a pending proceeding if this can be avoided. All of these matters may be considered further in determining the public interest in this and other proceedings.

In view of the need for early decision on the present interconnection, the full briefing of the issues by Otter Tail and staff, and the limited nature of the decision here, the requests for oral argument are denied.

The Commission finds:

(1) It is necessary and appropriate for the purpose of the Federal Power Act that further public hearing be ordered respecting the issues presented under Section 202 of the Act and in the Application (as amended) and Answer.

(2) On and after December, 1967 there has existed a shortage of facilities for the generation and and/or transmission of electric energy for supply of electric power in bulk to the distribution system owned and operated by the Village of Elbow Lake resulting from a shortage of installed reserves to meet an adequate standard of reliability for firm power supply and other uses.

[R. 1754] (3) Establishing a short-term open interconnection subject to automatic closure between Otter Tail Power Company's power supply system and that of the Vil-

lage of Elbow Lake for the supply of maintenance and emergency energy under an appropriate interconnection arrangement is in the public interest.

(4) The action here ordered is in the public interest.

(5) No undue burden will be imposed upon Otter Tail Power Company by the provisions of this order.

The Commission orders:

(A) Otter Tail Power Company's requests to dismiss the complaint of the Village of Elbow Lake are hereby denied.

(B) Otter Tail Power Company is hereby directed to permit establishment of an open interconnection subject to automatic closure between its bulk power supply system and that of the Village of Elbow Lake. The interconnection shall be operated for the supply of emergency (including maintenance) power and energy under terms and conditions to be agreed upon by the parties, or failing such agreement, as may hereafter be determined after hearing. The interconnection shall remain until this proceeding is terminated and no longer subject to judicial review and for one year thereafter unless the Commission shall otherwise order. The Village of Elbow Lake shall install, and pay for, the necessary facilities for interconnection, and bear the expense of maintenance thereof.

(C) During the period of said interconnection, Otter Tail Power Company shall prepare itself to deliver and shall deliver, to the Village of Elbow Lake within its capability to deliver and from power surplus to its own needs, such power and energy as the Village of Elbow Lake may require to meet shortages of power caused by outage of

its own facilities in whole or in part, and the Village of Elbow Lake shall prepare itself to receive and shall receive such energy within its capability to do so as [R 1755] may be necessary to relieve a shortage of electric energy within said Village.

(D) Pursuant to the authority contained in the Federal Power Act, particularly Sections 202, 206, 308, 309 thereof, further public hearings shall be held upon the issues remaining in this proceeding in accordance with this opinion, a prehearing conference to expedite that hearing to commence on a date and at a time to be fixed by the Presiding Examiner or his successor in this proceeding, in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C. 20426.

(E) In order that the foregoing issues may be properly determined, Otter Tail Power Company is hereby directed, pursuant to the provisions of Section 301 (b), 308 and 309 of the Federal Power Act, and the Village of Elbow Lake is hereby directed pursuant to the provisions of Section 307 (b), 308 and 309 of the Federal Power Act, to grant to authorized members of the staff of the Federal Power Commission during regular business hours, free access of its property and access to and the right to inspect and examine all of its accounts, records and memoranda and shall either furnish copies of such material at the request of the staff, or make such material available for reproduction by the Staff, and shall produce such material for use by the staff prior to and during said hearing at Offices of the Commission, 441 G Street, N. W., Washington, D. C. 20426.

(F) Notices of intervention and petitions to intervene

may be filed with the Federal Power Commission, Washington, D. C. 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 and 1.37) on or before December 5, 1968.

(C) Oral argument is denied.

By the Commission.

(Seal)

Gordon M. Grant,
Secretary.

* * * * * * *

APPENDIX C

[R. 1797] OPINION AND ORDER DENYING RE-HEARING AND MOTION FOR STAY.

(Issued December 24, 1968.)

(Title Omitted.)

Opinion No. 551-A.

* * * * * * *

Carver, Commissioner:

Otter Tail Power Company on November 25, 1968 filed an application for rehearing of the Commission's Opinion 551, Village of Elbow Lake v. Otter Tail Power Company, issued November 6, 1968, and in that document prayed for oral argument on rehearing. By that Opinion the Commission ordered a short term interconnection under Section 202 (b) of the Federal Power Act. We also ordered further hearings on whether a long term interconnection would be appropriate after certain staff studies have been completed. Our analysis of Otter Tail's objections in its application for rehearing indicates that they are substantially discussed and answered by our opinion and order, but the following further comments may be in order.

Otter Tail argues that the creation of a duplicative and uneconomic Elbow Lake system does not reduce costs or promote regional interconnection, integration and coordination of facilities; that the Commission recognized that the establishment of inefficient small generating plants should be avoided and that ripping out an existing distribution system and building a duplicate is economically wasteful.

but that the Commission made "no specific findings of fact in this regard." These and related issues are directed toward the question of an appropriate long term interconnection, and, therefore, may be considered in further hearings, as provided for in Opinion 551.

[R. 1798] Otter Tail argues that the Commission avoided making any findings on the issues presented under Section 202 (c) and that this was directly contrary to the Commission's own outline in our Order for Hearing. We are aware that our June 14, 1968 order directed the Examiner to hear issues pertaining to 202 (c) in advance of 202 (b); however, the Examiner ruled that the hearing would include issues relating to both sections to the extent that counsel were prepared to present evidence thereon. Otter Tail presented evidence bearing on issues under Section 202 (b) without objecting to the Examiner's ruling and in its brief before the Commission urged that all issues should be resolved. Indeed, in Otter Tail's application for rehearing, it urges that "[t]he Commission erred in making a final determination on some, but not all, of the issues . . . It is submitted that the hearing was conducted on the basis of a complete hearing on all issues." Section 202 (b) and 202 (c) both provide for interconnections under differing sets of circumstances. Having ordered an interconnection under 202 (b), there is no requirement that the Commission then make findings under 202 (c). An adequate record was developed on 202 (b) issues sufficient to allow the Commission to order a short term interconnection. Otter Tail, contending that the record is complete, appears to agree. Therefore, the Company's contentions that we must also make findings under 202 (c) is without merit.

In a separate document, also filed on November 25, 1968, Otter Tail Power Company urged the Commission to stay Opinion 551 pending the disposition of the application for rehearing, "and until these proceedings have been finally determined by due process of law." On December 5, 1968, Commission staff filed its opposition to the motion for stay. The company suggests that the hearing on a long term interconnection will be prejudiced from an "economic and practical" standpoint due to the high cost of the facilities needed to accomplish the interconnection, even though it recognizes that Elbow Lake will bear these costs. The Commission was faced with this issue when it decided Opinion 551. We found there that a shortage existed of installed reserves in the municipal distribution system to meet an adequate standard of reliability for firm power supply. We adhere to that conclusion. Otter Tail suggests that the status quo should be preserved. We disagree. We held that pending the development of additional evidence and further hearings, Elbow Lake should not operate in isolation and we affirm that view.

[R. 1799] The Commission finds:

The assignments of error and grounds for rehearing and stay as set forth in the application for rehearing and motion for stay filed by Otter Tail Power Company present no facts or legal principles which would warrant any change, modification or stay of Commission Opinion 551 and accompanying order.

The Commission orders:

The application for rehearing, together with its prayer for oral argument and the motion for a stay, both filed on

November 25, 1968, by Otter Tail Power Company, are denied.

By the Commission.

(Seal)

Kenneth F. Plumb,
Acting Secretary.

* * * * * * *

APPENDIX D

(Subject Index Omitted.)

PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

(Heading Omitted.)

PETITION FOR REHEARING

Otter Tail Power Company (Otter Tail) for its Petition for Rehearing, respectfully submits the following:

The Opinion of the Court is dated and was filed on August 4, 1970. This Petition for Rehearing is filed within the time and as provided by Rule 40 of the Rules of Appellate Procedure.

The points of law or facts which, in the opinion of the Petitioner, the Court has overlooked or misapprehended are as follows.

The Petitioner respectfully submits that there are two issues of law which the Court did not consider or determine, and which were presented to the Court and argued under the following headings contained in Petitioner's Brief herein.

I.[1]

THE COMMISSION'S DECISION RESTS UPON AN IMPROPER RULE OF LAW, IN HOLDING THAT SECTION 202(b) GRANTED AUTHORITY TO ORDER THE USAGE OF PUBLIC UTILITY FACIL-

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[1]Point IV, page 35 of Petitioner's Brief.

ITIES FOR PURPOSES FOR WHICH THEY HAVE NOT BEEN DEDICATED.

II.[1]

THE COMMISSION ERRONEOUSLY CONCLUDED, AS A LEGAL PRINCIPLE, THAT THE FACT THAT OTTER TAIL'S INTEGRATED SYSTEM WILL BE ERODED AND ITS CREDIT IMPAIRED IS NOT A FACTOR TO BE CONSIDERED IN DETERMINING WHETHER THE ORDER PLACES AN UNDUE BURDEN ON OTTER TAIL.

Petitioner also respectfully submits that the Court misapprehended, in part, the facts, in the paragraph, on pages 7 and 8 of the Opinion, which starts as follows—"We believe Otter Tail misconceives the variety of interests involved . . .", in that, the consumers of Otter Tail who will be burdened with the increased costs falling upon them as the result of an erosion of Otter Tail's system should also be considered as a part of "the public" which "has a stake in this controversy".

ARGUMENT

I.

THE FEDERAL POWER ACT DOES NOT ERADICATE THE RULES OF LAW REGARDING THE DEDICATION OF PROPERTIES FOR PUBLIC SERVICE.

The facts and law on this legal point are presented in Petitioner's Brief on pages 13 and 14, and 35-38 incl. The

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[1]Point III, page 33 of Petitioner's Brief.

legal issue is there clearly presented for decision. One of Otter Tail's problems in the future will be, that if this Court does not specifically consider and decide the issue, it may be claimed that the issue has been decided adversely and will be res judicata.

In support of the merits of this point, we assume we should not repeat the details of what has already been presented in Petitioner's Brief and above referred to. Perhaps a brief summary will be helpful.

The facts are clear. Otter Tail has consistently and historically dedicated its properties to retail service and has specifically stated that it does not hold itself out generally to supplying wholesale service. One of the most explicit statements of this policy is a filing with the Federal Power Commission as early as 1947.[3] Both the Commission[4] and this Court[5] recognize that practically all of Otter Tail's sales are on a retail basis.

As a legal principle, the necessity of dedication of properties to the public use in question is a basic rule of law established by the authorities cited on pages 37 and 38 of Petitioner's Brief. No authorities have been cited contra.

The construction of the Federal Power Act is a judicial function. The Federal Power Commission construed Section 202(b), and, in so doing, held that Section 202(b) made it unimportant whether facilities have been dedicated or held out for a particular service.[6] On this appeal, we took exception to this legal conclusion. Hence, we submit that

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[3]Ex. 13; R. 770; and 211-213, incl.
[4]R. 1751.
[5]Page 2 of Opinion issued August 4, 1970.
[6]R. 1752.

the legal issue is fairly and squarely presented and should be decided.

II.

CONGRESS DID NOT LIMIT THE "NO UNDUE BURDEN" PREREQUISITE IN SECTION 202(b) TO A PHYSICAL BURDEN UPON THE FACILITIES.

This is a pure legal question involving a judicial construction of Section 202(b) of the Federal Power Act. The Federal Power Commission construed the Act—

> "A careful reading of the Act leads us to the conclusion that the term 'undue burden' as used therein refers to a physical burden upon the facilities and not to an economic burden upon the company."[7]

There is no basis in the Act itself to warrant such a limiting construction of the words used by Congress. It is important here because the evidence shows (and continues to show in the further hearings and doubtless will be reflected in a later decision of the Federal Power Commission in this case) that Otter Tail's integrated system will be eroded and its credit impaired by establishing a precedent here which furnishes a path for other communities to follow in leaving Otter Tail's system.

This point is presented and argued on pages 33-35, incl. of Petitioner's Brief. "Undue burden" must certainly include serious damage to a utility's future ability to serve its customers and remain a viable entity. We add that "no undue burden . . . upon such public utility" has a narrower focus than the "public interest" requirement, which is contained in the same sentence in Section 202(b). True,

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[7]R. 1751.

these factors should be and will be taken into account in determining whether or not it is in "the public interest" to order an interconnection; and, as pointed out by both the Commission and this Court, there may be cases where the benefits to the public might outweigh the adverse effects on the utility, the decision requiring a balancing of all interests involved. However, Congress, in addition to consideration of "the public interest", made it clear that a compulsory interconnection should require a finding that "no undue burden will be placed upon such public utility thereby".[5]

Here too, this legal point was expressly raised on this appeal, and, while not mentioned in the Opinion, may be claimed to have been adjudicated. We respectfully submit that Petitioner is entitled to specific consideration and decision of the point.

III.

THE "STAKE OF THE PUBLIC" INCLUDES OTTER TAIL'S CONSUMERS IN ITS REMAINING TOWNS AS WELL AS ELBOW LAKE'S CONSUMERS.

This point relates to the wording of a small portion of the Court's Opinion which may result in a misapprehension of the meaning of the decision and affect future proceedings.

On the bottom half of page 7 and on the top of page 8 of the Opinion of this Court, the Court discusses the contention of Otter Tail that a compulsory interconnection with

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[5]Section 202(b) of the Federal Power Act is reproduced in the Addendum to this Petition for the convenience of the Court.

Pillow Lake would encourage other towns on Otter Tail's system to follow the same path. The Court then states:

> "Were this a conflict solely between Otter Tail and Pillow Lake, the argument might be well founded, but the controversy is not so limited. The consumers of Pillow Lake must also be considered, some, we dare say, who perhaps opposed their village's move in to the power business. In short, the public also has a stake in this controversy."

The Record shows that an erosion of Otter Tail's system and impairment of its credit will result in the remaining consumers on Otter Tail's system being burdened with increased costs of service.[9] The spectrum of Otter Tail's remaining consumers in the 465 municipalities served by Otter Tail's system is a much broader segment of "the public" which "has a stake in this controversy" than the consumers in Pillow Lake. At least, they should be considered as a part of the public having such a stake. Over and beyond this, there are the aspects of the social waste involved in encouraging uneconomical misadventures."

We do not believe that the Court intended to leave the inference that the balance of Otter Tail's consumers were not included in "the variety of interests involved", or that they were not a part of "the public" which "has a stake in this controversy", and respectfully request the Court to clarify the Opinion in that regard so that no misapprehension will result.

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[9]R. 225-231, incl., 443-453, incl.; 458-459; 479-482, incl.

[10]R. 449-454, incl.; 457-459, incl.; 471-474, incl.; 478-479; 482-485, incl.

CONCLUSION

We have limited the contents of this Petition for Rehearing to the scope of such a petition as provided in Rule 40, and have not restated our position on the points which have been considered and decided in the Opinion of the Court.

We respectfully submit that the points of law which have been overlooked and which are stated above, and the clarification of the language of the Opinion which might result in a misapprehension referred to in Point III above, are the proper subjects of a rehearing, and that a rehearing should be granted for proper consideration thereof.

Dated August 13, 1970.

Respectfully submitted,

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(Addendum and Certificate of Service Omitted.)

[illegible]

[illegible]

(Title omitted)

Petition of petitioner for rehearing filed in this cause having been considered it is now here ordered by this Court that the same be and it is hereby denied

August 21 1970

[illegible]

[illegible]

[illegible]

SECTION 202(b)*
of the
FEDERAL POWER ACT

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to such State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

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16 USCA 796
DEFINITIONS

The words defined in this section shall have the following meanings for purposes of this chapter, to-wit:

* * * * * * *

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*16 USCA 824a(b)

(11) "corporation" means any corporation, association, company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined.

(12) "person" means an individual or a corporation.

(13) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power.

Section 201(f)

(16 USCA 824(f))

of the

FEDERAL POWER ACT

"No person in sections 824-824h of this title shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

APPENDIX F

LEGISLATIVE HISTORY OF CERTAIN PORTIONS OF THE 1935 AMENDMENT TO THE FEDERAL POWER ACT.

S. 1725 and H.R. 5423 were introduced in the 74th Cong., 1st Sess., on February 6, 1935. After hearings and amendments S. 2796 was substituted for S. 1725, and after further amendments was passed by Congress and signed by the President August 26, 1935 (49 Stat. 847).

What is now Sec. 202(b) was Sec. 203(b) as introduced in the original Bills S. 1725 and H.R. 5423, and originally read as follows:

> "Sec. 203(b) Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more other persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons. Where any such order affects two or more persons, the Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

(House Hearings, p. 32; Senate Hearings, p. 40.)

After amendment and redrafting as S. 2796 and as finally passed, the present Sec. 202(b) was changed to read as quoted on page 2 of this Addendum above. The changes in the language are significant and major and are commented on in the Argument in Petitioner's Brief.

The following are excerpts from the testimony before Congressional Committees.

Testimony of Commissioner Seavey

"Mr. Pettengill. Do you know whether it is planned to use the private power lines of the United States to carry the electric energy generated at the Tennessee Valley power plants?

"Commissioner Seavey. No, this act does not go to that extent."

* * * * * * *

"Mr. Pettengill. Would it require any further authorization than that that is in this bill?

"Commissioner Seavey. Yes, it would require an additional provision in this act, if that were to be done.

"Mr. Pettengill. Why is that? * * *

"Commissioner Seavey. Well, the person that has that privilege under this bill is a person defined as an individual and a corporation would not come under it; *it would not include a municipality* or a Government power development, or the Tennessee Valley Authority.

"Mr. Pettengill. Therefore, is it your judgment then that no Government generating plant could require the use of private power lines to carry their electric energy under the terms of this bill as written?

"Commissioner Seavey. Yes, that is my opinion, except through the provisions where voluntary agreements may be entered into at which time those voluntary agreements would be supervised by the Federal Power Commission" (House Hearings, p. 395).

* * * * * * *

(Emphasis supplied.)

"Mr. Pettengill. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley authority *or a municipal plant owned by a city, or a State*, is that correct?

"Commissioner Seavey. Yes; that is my understanding of the bill.

"Mr. Pettengill. Because as you said, *the word 'person' does not include a municipality or a governmental body?*

"Commissioner Seavey. I think that *municipalities are particularly* excluded, and it is my belief that any other Federal agency, any other governmental agency, would be excluded under the terms of the bill" (House Hearings, p. 397).

(Emphasis supplied.)

Testimony of Solicitor DeVane.

"Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

Mr DeVane. No sir, and I want to make that very definite, and if there is any doubt about it we [illegible] I am concerned such amendment might be made as to make it clear. * * * We have worded as State municipal or Government projects are concerned we included them from the provisions of the Commission as [illegible] coming under this act. We have been very most and honest in our effort to accomplish this result. We think we have done it. * * * If * * * it is the desire of Congress that we * * * give the municipal or governmental projects the right to use the transmission lines of private ownership, and we have not succeeded in making that clear in this bill, an amendment should be prepared that will do it better. It will receive our hearty endorsement. * * *

(Emphasis supplied.)

Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance. Assume that a municipality builds a plant for the generation and distribution of electric energy. Assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

Mr. DeVane. No, sir. * * *" (House Hearings, p. 814)

* * * * * * *

"Mr. Wolverton. Then, you do not think that the

power given in this bill to the Federal Power Commission would enable it to direct that these transmission lines be so used?

Mr. IKARD. Mr. Wolverton, my answer to that is this: that if there is any doubt about it and this committee can remove that doubt by additional words in this bill let's put them in. (Hearings, p. 313.)

* * * * * * *

Mr. IKARD (in reply to Mr. Merritt). There is nothing in the bill that prevents interconnection between public and private systems, but when you come to section [illegible] which gives the Commission power to compel interconnections, it is our position and it is our intention that the Commission *shall not have the power to compel interconnections between public and private systems.* (Hearings, p. 317.)

* * * * * * *

(Emphasis supplied.)

Mr. MAPES. Is it the purpose to compel the private owned transmission companies to carry the energy of municipal projects as well as private projects?

Mr. IKARD. No, sir. I thought I had made that very clear. If I did not, I want to make it very clear now. It is not intended to give the Commission power to require the private lines to take on any power generated by municipal plants or by Government plant.

"Now, that is a policy for Congress to determine.

but so far as the Federal Power Commission is concerned, it is not asking or seeking that authority, and this bill does not propose to give the Commission any jurisdiction over that kind of a case.

"Mr. Mapes. The Commission does not propose it; and in your opinion the bill does not allow it.

"Mr. DeVane. The bill does not, and if there is any doubt about it, the bill should be amended in that respect, and I have promised to try to draw other language that will accomplish it" (House Hearings p. 546).

* * * * * * *

"Mr. DeVane. I pointed out when the same question was asked me before that the only power conferred under 203(a) on the Commission was the power to create regional districts, *and the power conferred upon the Commission under 203(b) in connection with the interchange of power and with interconnections of facilities related to private industry only* * * *" (House Hearings, p. 564).

* * * * * * *

"Mr. DeVane. * * * The only thing that we (the witness and the Commission) have discussed is the desirability of making it perfectly clear in this law that it is not the intention of this law to reach out and get control of that power nor is it the intention of this law to authorize the Commission to require the transmission of that power on the lines of these private operating companies" (House Hearings, p. 559).

* * * * * * *

(Emphasis supplied.)

"Mr. Wolverton. Well, suppose it is advisable, but they will not enter into a voluntary coordination?

"Mr. DeVane. Then, *as between the private utilities* that are subject to the jurisdiction of the Commission, they can be compelled to interconnect.

"Mr. Wolverton. *But not compel privately operated companies to operate their facilities in connection with the publicly owned company.*

Mr. DeVane. *That is correct.* That is the purpose that we have sought to accomplish by the bill. That is what we believe we have accomplished by the bill" (House Hearings, p. 565).

* * * * * * *

"Mr. Wolverton. The thought that I have in my mind is based fundamentally upon this: You have stated that the bill itself does not control Government or *local publicly owned projects.*

"Mr. DeVane. If you will turn to page 78 of the bill, paragraph (3), line 14, you will observe that *municipalities are definitely excluded*" (House Hearings, p. 565).

At Hearings on S. 1725 before the Senate Committee Mr. DeVane testified:

"Mr. DeVane. I wish also to make it clear at the outset that title II of this bill *is applicable to the private utilities only.* * * *" (Senate Hearings, p. 255).

* * * * * * *

"Senator Hastings. You mean it does not apply to a publicly owned power plant?

"Mr. DeVane. It does not apply to a publicly owned power plant. * * *

"Senator Hastings. Why is that?

"Mr. DeVane. Because it has not been drawn to include public plants."

* * * * * * *

(Emphasis supplied.)

"Senator Hastings. Are they specifically exempted here under this bill, or is it just because you do not mention them?

"Mr. DeVane. We just do not include them. The only time the word itself appears is in section 202 A, where voluntary coordinations may be worked out between private and municipal plants, *but so far as the mandatory provisions of the bill are concerned, they are not included*" (Senate Hearings, p. 256).

* * * * *

"Mr. DeVane. I would like to enumerate the several objectives of the bill. They are as follows: * * *

"(2) Authority to establish regional districts for the control of the production and transmission of electric energy. The bill provides for voluntary coordination under the supervision and direction of the Commission of the privately- and publicly-owned electric facilities in the several districts, and *as to the privately-owned facilities*, the Commission is given authority to require physical connection and the purchase, sale or interchange of power" (Senate Hearings, pp. 257, 258).

Sec. 201(f), quoted in Petitioner's Brief at page 51, was not in either S. 1725 or H.R. 5423 as originally introduced. It was drafted and inserted in the bill after Congressional hearings. It first appeared as Sec. 201(e) of S. 2796, drafted by the Senate Committee and passed by the Senate. Its purpose was clearly stated in the Report of the Senate Committee (Senate Report No. 621, 74th Cong., 1st Sess.), at p. 19:

> "A new subsection (e) has been added to remove all doubt that the act is not to apply to public projects, Federal, State *or municipal*. Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the *Commission to compel private utilities to establish connection or exchange power with public plants*. This new subsection carries out in unmistakable terms the original intention of the bill in this respect."

(Emphasis supplied.)

and at p. 49:

> "Subsection (e) expressly excludes from the operation of the act of the United States, the States, municipalities, and all of their agencies. *It is designed to make perfectly clear that no compulsory powers may be exerted upon public projects or upon privately owned projects for the benefit of public plants.*"

This section was included without change as Section 201(f) in S. 2796, as drafted by the House Committee, and passed by the House, adopted by the Conference Committee

and enacted by Congress. The Report of the House Committee (House Report No. 1318, 74th Cong., 1st Sess.), stated with respect to this subsection (p. 27):

> "Subsection (f) which is in the Senate bill as subsection (e) expressly excludes from the *operation* of the act the United States, the states, *municipalities*, and all of their agencies"
>
> (Emphasis supplied.)

APPENDIX G

EXCERPT FROM THE BRIEF OF THE SOLICITOR GENERAL OF THE UNITED STATES IN THE *CALIFORNIA CASE*.

"We do not suggest that either the United States or municipalities are 'persons' or 'corporations' for all purposes under the Federal Power Act. Certainly the United States is not subject to affirmative regulatory control, and the same is true as to municipalities except where the statute is specific. See § 201(f) and §§ 4(e) and 10(e). *Neither state nor federal governments were to be regarded as 'persons' for purposes of requiring private utilities to make interconnections with them under § 202(b).* (Federal Power Commission v. Idaho Power Co., No. 12, decided November 10, 1952.) Statements in Committee hearings indicate that the definitions of 'persons' and 'corporations,' as well as § 201(f), were thought to be means of achieving this end. See Senate Hearings on S. 1725, 74th Cong., 1st Sess., pp. 256-257; House Hearings on H.R. 5423, 74th Cong., 1st Sess., pp. 395-398. *On the other hand, for purposes of the regulation of rates charged where private utilities voluntarily undertake to render service to the federal or local governments as wholesale purchasers for resale* (as in this case) and for purposes of judicial review (Far Eastern Conference v. United States, 342 U.S. 570, 576), *we think it clear that the United States is to be regarded as a 'person'.* (Brief for the United States, pp. 38-39)." (Emphasis supplied.)

APPENDIX H

In The

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 27404

FLORIDA POWER CORPORATION,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition for Review of an Order of the
Federal Power Commission (Florida Case)

(May 1, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

BROWN, Chief Judge: In this petition to review a Federal Power Commission order requiring the interconnection of the electrical transportation lines of the Florida Power Company with the distribution system of the City of Gainesville, Florida, primarily to secure emergency back-up power to overcome outages, two basic issues are presented. First, Florida Power contends that the Federal Power Act, 16 U.S.C.A. §791 et seq., does not give the Commission

jurisdiction to order a privately owned power company to interconnect its lines with those of a municipally owned system that both generates and distributes its own power. Second, the Commission's basic policy concerning the terms upon which an interconnection will be ordered is questioned.[1] Florida Power argues that the Commission's policy of looking to the proportionate burdens that each system places upon the interconnected system networks instead of the benefits received as a result of the particular interconnection is inconsistent with the statutory authority to compel the interconnection.[2]

[1] Florida Power asserts that it should be compensated financially for providing the interconnection. By a subsidiary point it also argues that the City should be restricted in the areas in which it directly competes with Florida Power by duplication of facilities. We believe that the question of duplication of facilities is not directly related to this case and hold that the Commission was proper in refusing to condition the ordered interconnection of facilities on the elimination of this duplication.

[2] Section 202(b) of the Federal Power Act, which grants the Commission authority to order interconnection, provides:

> "Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with any such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

16 USCA § 824a(b).

We conclude that the Commission has jurisdiction to order this interconnection. We do not believe, however, that the Commission's order concerning the terms of this interconnection is consistent with the statute and thus we refuse enforcement of the order insofar as it fails to compensate Florida Power for making available large quantities of back up power at the interconnection.

I.

A. The City of Gainesville System

The City of Gainesville owns an isolated electric generation, transmission, and distribution system that serves 17,212 customers in the City and the adjacent areas. This system is projected to have a capacity of 138.4 mw[3] of generation in 1970 with its largest unit rated at 50 mw. The only transmission facilities operated by this system are a 115 kv[4] loop around the City and a 115 kv line to establish connection with Florida Power. The projected maximum peak hour demand (peak load) of the City's system in 1970 will be 102 mw.

B. Florida Power's System

In contrast to the small City of Gainesville system[5] Flor-

[3]A megawatt (mw) is a large unit of electric generating capacity. It is 1,000 kilowatts or 1,000,000 watts.

[4]A kilovolt (kv) is a large unit of electrical voltage used to rate transmission lines. Depending upon the size of the conductor a 115 kv line has a capacity of approximately 125 mw.

[5]The disparity in the sizes of the Gainesville and Florida Power systems and in the sizes of their electrical resources is striking and highly significant. These disparities in size are increasing each year as a result of the annual load growth on the Florida Power system being currently almost twice Gainesville's 1966 peak load and in excess of Gainesville's projected 1970 peak load of 102 mw. Gainesville's largest 50 mw gen-

ida Power operates a major generation, transmission, and distribution system that serves 370,000 retail customers and supplies wholesale power to 12 municipal distribution systems and 9 REA cooperatives. It covers 20,600 square miles in West, Northwest, and Central Florida. During 1970 Florida Power will have 2114 mw of generation and projects a peak load of 1826 mw.

Florida Power's massive system operates through a backbone transmission network, and is connected with four major electrical systems in peninsular Florida (Tampa Electric Company, Florida Power & Light Company, Orlando Utilities Commission and Jacksonville Electric Authority). It is also connected with Georgia Power Company and Gulf Power Company.

C. The Results of the Interconnection

Obtaining emergency reserves[6] both instantly avail-

erator is dwarfed by 8 generators on the Florida Power system and is about the equivalent of units that Florida Power uses only to meet peak load conditions and frequently are placed on cold shut-down.

[6]Emergency backup service is providing the reserve of generation which a system must have to protect against inability to supply load in the event of a failure or outage of generation. Generally speaking, it is industry practice to have available a reserve of generating capacity at least equal to the capacity of a system's largest generator. To the extent emergency backup service is available from some other source, a system can reduce its installed reserve of generation. Generally speaking, it also is industry practice to protect against a failure or outage of a system's largest generator by operating at all times a reserve of generation (customarily referred to as spinning reserve) equal to the load being carried by the largest generator in operation. The operating reserve of generation, as distinguished from the installed reserve of generation, is called spinning reserve because it must be in operation and be instantaneously available. If the operating reserve of generation is not instantaneously available with a loss in frequency of less than one-half cycle per second—1/120th of a second—the system will suffer a frequency disturbance that can cascade, trip out other generating units, and shut down the entire system.

able and peak load installed capacity—in small isolated systems such as that operated by the City is a difficulty accentuated more by isolation than size. The only two solutions are the acquisition of additional generating capacity that will rarely be used and which is economically inefficient since a large portion of it must be kept in operation or "spinning" in order to provide the essential instantaneous reserve (see note 6, supra) or to end the system's isolation by connection with other systems that can provide the emergency reserve.

To acquire emergency reserve of 50 wm, the size of its largest generator, the City chose the latter solution and sought to achieve the desired interconnection through negotiation with Florida Power. When they were unable to come to terms, the City filed an "Application for Interconnection and Complaints Against Unlawful Actions"[7] with the Commission.

Pursuant to this application a hearing was held. The Presiding Examiner found that an interconnection was clearly in the public interest since the City would be relieved of the necessity of maintaining and adding to its present inordinately large and inefficient generating reserve. Under the terms of the recommended order Gainesville would have an additional reserve capacity equal to the size of its largest generator, would save approximately $300,000 per year[8] in investment and operating cost even

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[7]The City's charges of unlawful activity relate to the direct competition between the City and Florida Power in rural Alachua County. See note 1, *supra*.

[8]The Presiding Examiner found that the savings would be "in excess of $300,000." The Commission staff submitted a study showing Gainesville would realize investment and operating savings from reduction of its

after paying the cost of the interconnection,[9] and would have the reliability of a bulk power supply that it could have not previously achieved.

The Presiding Examiner found, however, that the benefits of the interconnection flowed in the direction of the City's system. Florida Power, because of the relatively small size of the City's generators, would receive no significant additional reliability.[10] Because of the automatic nature of the interconnect, however, Florida Power will sell some power to the City in non-emergency situations, but these periods will be rare because the City has already built up large quantities of excess capacity that can be used to meet high demand periods. The Presiding Examiner recommended that, even though no additional facilities would be needed and there would be no undue burden on the Florida Power system, Florida Power should be compensated.

He recommended that no set demand charge be imposed on the City. Instead, he recommended that "the total

installed reserve of generation averaging about $231,000 a year for the period of 1970 through 1979. Florida Power witnesses estimated these savings at $520,000 a year.

[9]The Commission and Presiding Examiner agreed that the City should bear the whole cost of building the physical facilities necessary for the interconnection. This will cost between $1,500,000 and $3,000,000 depending on the length of the transmission lines the City chooses to use.

[10]The Presiding Examiner concluded that Gainseville could contribute only 6 mw, 3 mw, and 2.5 mw to Florida Power's system reliability. It seems clear that these amounts are too insignificant to have meaning or value to Florida Power, which must have emergency power instantaneously available (spinning reserve) to withstand outages or more than 400 mw. Moreover, Florida Power's backbone transmission network has so many power sources more efficient and economical than Gainesville's small generators it is totally unrealistic to consider the City's system a significant power source.

operating benefits in dollars received by each party by reason of the interconnection be computed based on the respective estimates of savings to each, and payment of 50 percent of the difference be made by the party receiving the greater benefit by reason thereof to the party less advantaged . . . ."

The Commission agreed that the interconnection was in the public interest. It concluded, however, that no compensation should be paid. Its decision was based on a policy of responsibilities which it phrased this way:

> "As a general proposition we note that whenever two electric systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no

economic penalties for being the last one on the interconnected network."[11]

Pursuant to that policy it concluded that payment for the energy actually used and the City's assumption of the cost of the interconnection adequately compensated Florida Power. As expected revenues from all types of services called for by the compulsory interconnect bear upon compensation, the order prescribed the rates, etc. for the three types of services set out in paragraph 7(d) (e) and (f), which are not to provide instantaneous emergency reserves.[12]

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[11]City of Gainesville v. Florida Power Corp., 1966, — F.P.C. —, —.

[12]The terms and conditions of the services are set out in paragraphs seven and eight of the order:

"(7) The terms and conditions of the sale and exchange of electric energy following the effective date of the interconnection, and thereafter, unless and until modified by rate schedule filing completed in accordance with Part 35 of the Commission's Regulations under the Federal Power Act or modified by Commission order, shall be as follows, subject to modification by written agreement of the parties and acceptance by the Commission of such modification:

(a) Installed Reserves: Gainesville shall own or provide generating capacity resources equal to or greater than 115 percent of Gainesville's estimated annual peak-hour demand. The estimated peak-hour demand for any year shall be that given for the calendar year in Schedule 19 of the latest FPC Form 12 Report filed by Gainesville with this Commission, unless otherwise agreed to in writing by the parties.

(b) Economy Energy: If the parties engage in economy energy transactions, payment therefor shall be at the rate per kilowatt hour of one-half the sum of the incremental cost of providing the energy from the seller's resources plus the incremental cost that would have been incurred by providing the energy from the buyer's resources.

(c) Operating Reserves: Gainesville shall maintain spinning and ready reserves in accordance with procedures established by the Florida Operating Committee up to a limit of 15 percent of Gainesville's estimated annual peak-hour demand for ready re-

II.

Jurisdiction

Florida Power makes a frontal assault upon the Commission's action by a challenge to the Commission's authority to act upon the petition of a generating municipal

serves and up to a limit of 10 percent of that demand for spinning reserves.

(d) Inadvertent Energy Transfers: Inadvertent transfers of energy shall be returned by the receiving party in an amount equal to that received and at comparable times, or shall be paid for as specified in paragraph (7)(g) below.

(e) Emergency Electric Service: Emergency electric service provided for a period of less than 60 minutes shall be treated as Inadvertent Energy Transfer (see paragraph (7)(d) above). Such service, if provided beyond the end of a 60 minute period shall be treated as Scheduled Electric Service (see paragraph (7)(f) below).

(f) Scheduled Electric Service: To the extent of its ability to do so, each party shall provide power and energy to the other for scheduled maintenance of generating or other facilities. Payment shall be in accordance with paragraph (7)(g) below.

(g) Payments: Except for payments related to Economy Energy transactions, described under paragraph (7)(b) above, payments shall be as follows:

(1) Inadvertent energy, if not returned in kind, shall be paid for upon 30 days' notice given by the delivering party at the rate of 4 mills per kwh, or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the point of interconnection.

(2) Scheduled Electric Service shall be paid for at the rate of $.05 per kw per day for each kw of actual or scheduled demand, whichever is greater, if paid for by Gainesville or whichever is smaller if paid for by Florida Power, plus 4 mills per kwh or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the Archer Substation.

(8) Gainesville shall reimburse Florida Power for the annual costs associated with providing frequency regulation for its control area until such time as Gainesville installs tie-line bias control equipment

system. The argument is that Section 202(b) of the Federal Power Act, 16 U.S.C.A. § 824a(b) (see note 2, *supra*), only authorizes the Commission to compel a public utility to establish a physical connection with "one or more *persons* engaged in the transmission or sale of electric energy" (emphasis added). The argument then turns to section 3, the definitional section of the statute, 16 U.S.C.A. § 796,[13] and points out that "person" is defined as "an individual or a corporation" and then that section 3(3) defines "corporation" to expressly exclude municipalities. Florida Power also points out that Section 201(f), 16 U.S.C.A. §824(f), specifically provides that no

"provision in this Part [II, which includes Section

in its own system and assumes responsibility for regulation of its own control areas. Florida Power is directed to submit to the Commission a proposed rate schedule covering this type of service. If the parties cannot agree on how to classify Florida Power's costs associated with the frequency regulation function or on a method of allocating such costs to Gainesville, the Commission shall make the determination of the annual payment due from Gainesville to Florida Power after receiving the views and supporting calculations of each party."

[13] "The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

• • •

(3) corporation means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include municipalities as hereinafter defined;

(4) person means an individual or a corporation

• • •

(7) municipality means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power. . . .

16 USCA § 796.

> 202(b)] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto."

Despite the apparent cogency of the argument, this use of the definitional section of the statute as a limitation on the scope of the Commission's jurisdiction has previously been rejected. In United States v. Public Utilities Commission, 1952, 345 U.S. 295, 73 S.Ct. 707, 97 L.Ed. 1020, the Court held that the definitional section did not limit the Commission's authority over rate regulation[14] in addition, in New England Power Co. v. FPC., 1 Cir., 1965, 349 F. 2d 258 the First Circuit held that the definitional sections did not limit the power of the Commission to order an interconnection between a public utility and a nongenerating municipality.

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[14]The Court relied heavily upon the legislative history to demonstrate that the definitional sections were not controlling. The Court said that it did not "find any evidence of conscious coordination of §§ 3(3), (4) and 201(d) from the legislative history. True, they were simultaneously enacted, and, in fact, the interpolation of the word 'person' into § 201 (d) occurred after the §§ 3(3) and 3(4) definitions were in existence in S 2796, 74th Cong., 1st Sess., as passed by the Senate and reported to the House, June 13, 1935. But this alteration came at the insistence of the House. The Senate had provided for jurisdiction over sales occurring before or after interstate transmission, id., § 201(f), and the House amendment, from which § 201(d) in its present form stemmed, covered sales during the transmission across state lines for the first time. So the House Report is, we think, significant in its redefinition of the section. A 'wholesale' transaction is defined to mean the sale of electric energy for resale. HR Rep. No. 1318, 74th Cong., 1st Sess., p. 8. We conclude, therefore, that the Congress attached no significance of substance to the addition of the word person, and in fact did not intend it as a limitation on Commission jurisdiction. Indeed quite the contrary was sought by the House amendment of § 201(d)."

345 U.S. at 313, 73 S.Ct. at —, 97 L.Ed. at 1036.

Florida Power also argues that, independent of the language of the statute, the legislative history shows that generating municipalities were not " persons" for purposes of Section 202(b). This argument is more viable than the one limited to the language of the statute since both the Supreme Court and the First Circuit specifically reserved the question of whether a "municipality which generates as well as distributes electricity is to be regarded as a 'person' under this section of the Act." New England Power Co. v. F.P.C., supra, 349 F. 2d at 263. See also United States v. Public Utilities Commission, supra, 345 U.S. at 312-13, 73 S.Ct. at —, 97 L.Ed. at 1036-37. Moreover, Florida Power's position seems to draw support from the statements of the principal draftsmen of the Act, Federal Power Commissioner Clyde L. Seavey and Mr. Dozier A. DeVane,[15] Solicitor for the Commission. And such statements may be powerful indicia of legislative intent and purpose. Zuber v. Allen, 1969, — U.S. —, —, 90 S.Ct. —, —, 24 L.Ed. 345, 354.[16]

On closer examination, however, it is apparent that the statements of Commissioner Seavey and Solicitor DeVane refer only to the Commission's power to order public utili-

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[15]Later a United States District Judge.

[16]In Zuber the Court said: "It would be perverse to assume that congressional drafters, in eliminating ambiguity from the old act, were careless in listing their exceptions and selecting the illustrations from which the Committee Report from which their words would ultimately derive content." — U.S. —, — S.Ct. at —, 24 L.Ed.2d at 356. It should also be noted that the Supreme Court has previously used this testimony as an indication of legislative intent. In United States v. Public Utilities Comm., supra, the Court said that there "is evidence . . . that the exclusion of producing municipalities from Commission jurisdiction was intended. For instance, DeVane, Solicitor of the Federal Power Commission at the time, testified as follows before the Senate Committee . . . [excerpts from testimony]".

ties to act as transporters of—"wheel"[17]—low cost government power to a government customer at the expense of a privately owned company. See, e.g., Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 5423, 74th Cong., 1st Sess. (1935), 394, 395, 397, 532, 546, 559, 564; Hearings Before the Committee on Interstate Commerce, Senate, on S. 1725, 74th Cong., 1st Sess. (1935), 257, 260, 271. And, although there are general statements by them that do not necessarily refer to "wheeling", see e.g., Senate Hearings, supra at 256, after close examination of the entire legislative history we can find no support for the conclusion that municipalities which generate their own power were to be treated differently from nongenerating municipalities concerning anything other than "wheeling".[18]

III.

The Terms of the Ordered Interconnection

Even though the Commission has jurisdiction to order this interconnection and even though the connection is "necessary or appropriate in the public interest" and the interconnection will not put an "undue burden . . . upon" the facilities of Florida Power or "impair its ability to render adequate service to its customers", the terms of the inter-

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[17]Wheeling is where A, which has excess generating capacity, seeks to transmit power to its customer C with whom it has no transmission connection, by using the transmission facilities of B, which has connections with both A and C.

[18]From the legislative history cited by the Court in the California Utilities case, supra, it is apparent that when it specifically reserved the question of generating municipalities it was referring to the problem of "wheeling". See United States v. Public Utilities Commission, 345 U.S. at 312-13, 73 S.Ct. at —, 97 L.Ed. at 1036-37.

connection do not adequately satisfy the statutory requirements[19] because they do not provide Florida Power with the "reimbursement reasonably due" it. See 16 U.S.C.A. § 824a(b), (see note 2, supra). This interconnection will be of substantial benefit only to the City. Through the interconnection it receives essential emergency back-up, which is a service at all times instantaneously available, and which protects it against the outage of the largest of its generators. (See IC, supra.) The benefits to Florida Power, however, are largely illusory.[20]

[19]Although Florida Power makes a constitutional attack upon the Commission's action, we find it unnecessary to pass upon the questions raised.

[20]The Commission indicated that it believed Florida Power would receive certain vague but substantial benefits as a result of the interconnection. These vague benefits were (i) possible deferral of future generating units because of coordinate planning of new facilities, (ii) the electrical operating benefits from the availability of the City's small power contribution, and (iii) the possibility of additional reliability from the City's contribution since Florida Power does not have generators in the immediate area (see note 10, supra). But these benefits are unrealistic as well as vague. Florida Power's largest present unit has a 527 mw capacity and a 875 mw unit is scheduled to be in operation in 1972. Obviously, any savings from coordinated planning with a system with the largest generator with only a 50 mw capacity are highly theoretical. And the Commission did not even suggest how the interconnection with the City was to contribute operational savings and reliability (reliability is the most unrealistic of all, see note 10, supra) to Florida Power.

The Commission's conclusions were, however, tentative as well as vague and unrealistic—"If we were to appraise Florida Power's request for an annual standby charge in terms of 'splitting of the benefits' test . . ."—and are not fact-findings protected by the umbrella of the substantial evidence test. As Mr. Justice Frankfurter said in SEC v. Chenery Corp., 1943, 318 U.S. 80, 93, 94, 63 S.Ct. 454, —, 87 L.Ed. 628, 636, "Its action must be measured by what the Commission did, not what it might have done". See Schaffer Transportation Co. v. United States, 1957, 355 U.S. 83, 78 S.Ct. 173, 2 L.Ed.2d 117; 2 K. Davis, Administrative Law Treatise §§ 16.05, 16.09 (1958).

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But, although there is no direct cost, Florida Power, really its customers, will bear a substantial burden. They must bear the allocated fixed cost represented by the added obligation imposed under the terms of the ordered interconnection. And this burden will be reflected in their cost-based rates. They are entitled to not have to carry the entire responsibility for providing an extremely valuable service.

The Commission's policy of proportionate utility responsibility really works only one way. The small system receives high benefits and, because of its size, no real obligations. The large system, however, receives no benefit but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation.

Thus we deny enforcement of this order insofar as no provision for the reasonable compensation of Florida Power is made. The remainder of the order, however, is enforced, and compliance need not be delayed until the amount Florida Power is to be paid is determined by the Commission and that determination reviewed.

But in sending this case back to the Commission for it to fix a formula for computing what would be reasonable compensation, we do not even whisper what that formula should be. On reconsideration the Commission may determine that the set demand charge requested by Florida Power is a reasonable formula. It may determine that the 50 percent-of-the-difference-in-benefits formula of the Presiding Examiner is more appropriate. It may decide to use parts of both, neither formula, or a completely different formula. This is for the Commission subject to later review.

ENFORCEMENT GRANTED IN PART AND DENIED IN PART.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 950

OTTER TAIL POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND
VILLAGE OF ELBOW LAKE, MINNESOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1–9) is reported at 429 F. 2d 232. The initial opinion of the Federal Power Commission (Pet. App. B 1–17) is reported at 40 FPC 1262, and its opinion denying petitioner's application for rehearing (Pet. App. C 1–4) is reported at 40 FPC 1499.

JURISDICTION

The judgment of the court of appeals (Pet. App. A 10) was entered on August 4, 1970, and a petition for rehearing was denied on August 24, 1970 (Pet. App. D 8). The petition for a writ of certiorari was

filed on November 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether, pursuant to Section 202(b) of the Federal Power Act and upon the application of a municipally owned electric system, the Federal Power Commission may order a public utility subject to the Commission's jurisdiction to interconnect its electric power transmission facilities with those of the municipal system.

STATUTES INVOLVED

The pertinent provisions of Section 3(3), (4) and (7), and 202(b) of the Federal Power Act, 16 U.S.C. 796(3), (4) and (7), and 824a(b), are set forth at Pet. App. F 2-3.

STATEMENT

Petitioner, the Otter Tail Power Company, seeks review of a decision of the court of appeals upholding an order of the Federal Power Commission directing it to permit the Village of Elbow Lake, Minnesota, to establish at the village's expense a short-term interconnection with petitioner's facilities. Petitioner is subject to the Commission's jurisdiction under Section 201 of the Federal Power Act, 16 U.S.C. 824.

Until a municipally owned electric generating and distributing system was put into operation in 1966, the village had been supplied with power by petitioner (Pet. App. B 8). The municipal generating plant

consists of two generators each capable of generating 1136 kilowatts (kw) on a sustained basis and up to 1250 kw for two-hour periods (Pet. App. B 8). During the plant's first and second years of operation, the village experienced short-period peak loads of 1120 and 1245 kw, respectively (Pet. App. A 2). Recognizing that additional generating capacity would be needed to assure firm reliability to meet expected further increases in peak-period demand (Pet. App. B 9),[1] the village in 1968 applied to the Commission under Section 202(b), 16 U.S.C. 824a(b), to order an interconnection with petitioner, which the village offered to install at its own expense (Pet. App. B 3). Petitioner opposed the request (Pet. App. B 3).

After hearings conducted at petitioner's request, the Commission held first, that the village is a "person" entitled to apply for an interconnection under Section 202(b) and that a temporary, as well as a permanent, interconnection could be ordered under that section (Pet. App. B 7 8). On the merits, the Commission found that the village had a legitimate need for additional generating capacity and that interconnection with petitioner, at least for the short

[1] So long as the load did not exceed the capacity of one generator, the other was available as a reserve. If both generators had to be used to serve the load, there would be no reserve available to meet an outage of one of the generators and the system would not have firm reliability.

[2] An initial decision by the hearing examiner had been waived (Pet. App. B 1).

term,' was justified (Pet. App. B 9). Accordingly, the Commission ordered petitioner to permit, at the village's expense, installation of an interconnection on a temporary basis (Pet. App. B 14-15).[2] On review, the court of appeals upheld the Commission's decision (Pet. App. A 1-9).[3]

ARGUMENT

The decision below properly sustained the Commission's order and is consistent with decisions of this Court and other courts of appeals.

1. Petitioner's contention that a municipally owned distribution system is not a "person" with whom a regulated public utility may be ordered to interconnect under Section 202(b) of Part II of the Act rests on the definitions in Section 3 of Part I of the Act which do not specify municipalities as "persons" and on excerpts from the legislative history of Part II. These arguments, however, have consistently been rejected by the courts. In *United States* v. *Public Utilities Commission*, 345 U.S. 295, 312-313, this Court held that the Section 3 definition of "person" did not limit the Commission's jurisdiction over sales at whole-

[1] The Commission remanded the case to the examiner for a determination of whether a permanent interconnection with petitioner or others would be in the public interest (Pet. App. B 10). The hearings before the examiner on this issue have been completed, but the examiner has not yet rendered his decision.

[2] We have been informed, however, that as of November 17, 1970, the interconnection had not yet been installed, due to financing difficulties experienced by the village.

[3] Mr. Justice Blackmun, who had been a member of the panel that heard the case, did not take part in its disposition (Pet. App. A 1).

sale to municipalities under Section 201 of Part II even though such sales were defined by Section 201(d) as sales of electric energy "to any person for resale." Reviewing the legislative history, the Court found no "conscious coordination" between Sections 3 and 201 and concluded that "neither the legislative aim nor the realities of coordinated rate regulation compel * * *" reading "person" in Section 201 narrowly. 345 U.S. at 313, 316.

That the same reasoning applies in interpreting "person" in Section 202(b), to determine the scope of the Commission's authority to order interconnections, has been recognized by the First and Fifth Circuits as well as the court below. See *New England Power Co. v. Federal Power Commission*, 349 F.2d 258 (C.A. 1); *Florida Power Corp. v. Federal Power Commission*, 425 F.2d 1196, 1201 1203 (C.A. 5), certiorari granted on other issues on October 26, 1970, Nos. 464 and 469, this Term, cross-petitions on other issues pending, Nos. 651 and 652. These decisions, we submit, are patently correct.

2. Petitioner also challenges (Pet. 10, 11) the Commission's conclusion that the requirement of Section 202(b) that no "undue burden" be placed on the utility with whom an interconnection is sought relates to physical burdens, not economic burdens. Petitioner claims that the interconnection with the village will impose an undue economic burden on it as other municipalities, which petitioner serves at retail, may now be encouraged to set up their own distribution systems and then call upon petitioner to supply them

with emergency power at wholesale. The Commission recognized that the effect of the interconnection upon petitioner's financial well being would be relevant in considering, in the second phase of the proceeding now before the hearing examiner, any long term interconnection (Pet. App. B 11 12). While the Commission's interpretation of "undue burden" is sound, the issue is in any event not pertinent to the present case, which involves only a temporary interconnection. The present order cannot reasonably be expected to induce any municipality to establish its own electric system, let alone start a trend that could significantly affect petitioner's operational or financial integrity.

3. The further claim (Pet. 12 13) that petitioner may not be compelled to engage in wholesale business under Section 202(b) because it is in the retail business and has not generally held itself out to provide wholesale service is equally insubstantial. Aside from the fact that the interconnection provisions of Section 202(b) specifically apply to all jurisdictional utilities, including those not making any sales at wholesale, petitioner is incorrect in stating that it has not dedicated its facilities to the type of temporary emergency service ordered here. As the record shows, petitioner is a member of the Upper Mississippi Valley Power Pool, a group of six interconnected utilities, and has arrangements with the pool members and with others for the exchange of emergency power (Pet. App. A 1; J.A. 93–97, 304–305).

"J. A." refers to the joint appendix filed in the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1970.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 950

OTTER TAIL POWER COMPANY

Petitioner

vs.

FEDERAL POWER COMMISSION AND VILLAGE OF ELBOW LAKE, MINNESOTA

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 950

OTTER TAIL POWER COMPANY

Petitioner

vs.

FEDERAL POWER COMMISSION AND VILLAGE OF ELBOW LAKE, MINNESOTA

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Now comes the respondent Village of Elbow Lake, Minnesota, and opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the above-entitled matter and joins in and concurs with the response to said petition filed by the respondent, Federal Power Commission.

Dated at Elbow Lake, Minnesota, this 4th day of December, 1970.

Respectfully submitted,

I. L. SWANSON
Elbow Lake, Minnesota 56531
Attorney for Village of Elbow Lake

CERTIFICATE OF SERVICE

I, I. L. Swanson, attorney for the respondent Village of Elbow Lake, Minnesota, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of December, 1970, I served copies of this response to Petition for Writ of Certiorari on the petitioner herein and the respondent Federal Power Commission by depositing the same in the United States Post Office with postage prepaid addressed to each of the following parties:

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